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IN THE

Supreme Court of the United States

October Term, 1963.

No. 295

GERALD A. GUIDARELLI, a/k/a GERARDO A. QUINDARELLI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to The United States Court of Appeals for the Second Circuit.

LEONARD J. LITZ,
143 Clinton Street,
Schenectady, N. Y.,
Counsel for Petitioner.

LOUIS LOMBARDI,
34 Jay Street,
Schenectady, N. Y.,
Of Counsel.

THE REPORTER COMPANY, INC., Walton, N. Y.—CN 5-4151—1963

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1 Wigmore, Evidence §357 (3rd ed. 1940) 4

Supreme Court of the United States

OCTOBER TERM, 1963.

No.

GERALD A. GUIDARELLI, a/k/a Gerardo A. Quidarelli,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Gerald A. Guidarelli, by his counsel, pray that a writ of certiorari issue to review the judgment of the Court of Appeals affirming petitioner's conviction under Internal Revenue Code, §7201.

Opinion Below

The opinion of the Court below, (p. 10a, *infra*) has not yet been officially reported. The District Court rendered no opinion. Judgment of that Court was entered on the 26th day of November, 1962 (p. 8a, *infra*).

Jurisdiction

The judgment of the Court of Appeals was entered on June 5, 1963. A petition for a rehearing *en banc* was denied on June 24, 1963 (p. 13a, *infra*). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

Did the Trial Court commit prejudicial and reversible error when it:

1. admitted into evidence petitioner's prior arrests and *convictions* including the circumstances surrounding his activities as a gambler after petitioner's counsel expressed his willingness to stipulate that gambling was one of petitioner's sources of income;
2. admitted into evidence testimony by the Government agent relating to his conversations with the petitioner's wife, not in petitioner's presence and without petitioner's consent;
3. permitted the prosecuting attorney to use inflammatory and derogatory statements in his closing argument;
4. instructed the jury as to the overemphasis of evidence of the Government's net worth statement and then allowed the jury to continue to refer to this statement even though the artificial limitation of only allowing reference to the statement in the *jury box* and not the *jury room* was made.

Statutes Involved

Internal Revenue Code, §7201:

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

Statement of the Case

Petitioner was the proprietor of a newsroom in Schenectady, New York, and was also engaged, on a small scale, in bookmaking. The Government to determine petitioner's net income for 1956, 1957 and 1958, used the net worth expenditure method of estimating his income. As a result thereof, the Government charged that petitioner failed to pay $1,089.50 in income taxes in 1956, $1,745.10 in 1957, and $1,077.07 in 1958. It was also asserted that the source of the income upon which these taxes were due and owing was petitioner's gambling operations.

He was indicted for willful evasion of income taxes for the years 1956, 1957 and 1958. Trial was held in the United States District Court, Northern District of New York, before the Honorable Stephen W. Brennan. Neither the petitioner nor his wife testified at the trial. The jury found petitioner guilty of evading $1,247.54 in taxes for 1956 and $1,763.07 for 1957. He was acquitted for the year 1958. Petitioner was fined $1,250 and sentenced to six months imprisonment on each count, the terms of imprisonment to run concurrently.

The Court of Appeals affirmed petitioner's conviction and in its opinion (p. 10a, *infra*) made the following statements:

> "1. While we agree that the testimony in question [Government agent's testimony as to what defendant's wife told him] presents some interesting questions as to the application of both the spousal privilege rule and the hearsay rule, we need not concern ourselves with them here.
>
> "2. The Government may have made generous use of defendant's vulnerability from his gambling activities, but this was part of the story and the case.

"3. While we believe the prosecutor did overstep the bounds in summation—calling defendant a leech and accusing him of ruining a young law student relative's career by having the boy hold cash for him—we do not feel that these comments were sufficiently prejudicial to warrant reversal."

The Court of Appeals' position was that Judge Brennan cured these defects after they were before the jury.

Reasons for Granting the Writ

The ruling of the Court below is in conflict with decisions in numerous other circuits and with the Supreme Court on questions of general federal and common law (Fed. Rules of Cr. Proc. rule 26, 18 U. S. C.) which have constant and continuing importance. It is contrary to the accepted evidentiary rules governing criminal trials and frustrates these rules to a point where, if precedent is established in regards to the admissibility of evidence as decided below in the instant case, the probability of anyone receiving a fair and unprejudicial trial will be slight.

As to Question No. 1

The decision below is in direct conflict with numerous decisions holding that the prosecution may not resort to any evidence of defendant's evil character to establish the probability of his guilt. Again, it must be stressed, petitioner in the instant case did not testify. The entire issue as to character, disposition and reputation was closed to the prosecution's case-in-chief. *Michelson v. United States*, 335 U. S. 469 (1948); *Greer v. United States*, 245 U. S. 559 (1917); *Benton v. United States*, 233 F. 2d 491 (4th Cir. 1956); *United States v. Nettl*, 121 F. 2d 927 (3d Cir. 1941); 1 Wigmore, Evidence §357 (3d ed. 1940); 22 C. J. S. Crim. Law §682.

In the instant case petitioner offered to stipulate that he was a professional gambler. The prosecuting attorney refused to so stipulate and thus placed himself in the position of being able to offer evidence as to petitioner's character. Relying upon *Holland v. United States*, 348 U. S. 121 (1954), the prosecuting attorney asserted that the evidence as to petitioner's previous conviction and arrests as a gambler was introduced solely to establish that petitioner had another source of income. The prosecutor introduced evidence that petitioner was convicted as a common gambler in 1955, a preprosecution year (T/R 123).

Petitioner is aware of that line of cases which holds that a defendant's offered admission cannot estop the prosecution from introducing evidence on that point if such evidence is relevant and admissible. *Parr v. United States*, 255 F. 2d 86 (5th Cir. 1958), *cert. denied*, 358 U. S. 824 (1958); *Shelton v. United States*, 169 F. 2d 665 (D. C. 1948), *cert. denied*, 335 U. S. 834 (1948). However, in those cases the evidence introduced was a necessary element of the crime charged. In the instant case the only relevant part of the gambling evidence introduced by the Government is the fact that petitioner was a gambler, and even this fact is *not* a necessary element of the crime charged. Dicta in the *Holland* case indicates that the Government should show an additional source of income to the defendant if possible. The number of times petitioner was arrested or convicted (T/R 123), the type of equipment he used (T/R 68-69), and his technique for avoiding arrests (T/R 63) are neither relevant nor admissible. By the use of this strategy, the Government in fact tried and convicted petitioner because he was an obnoxious, unlawful and disorderly person, not because of his alleged income tax evasions.

As to Question No. 2

The decision below is in direct conflict with numerous decisions holding testimony by a third party as to a conversation with defendant's wife or agent, outside the courtroom, without defendant's authorization or not in his presence, is inadmissible. Such testimony contravenes the hearsay rule or the spousal privilege rule or both. *Shama v. United States*, 94 F. 2d 1 (8th Cir. 1938), *cert. denied*, 304 U. S. 568 (1938); *Yep v. United States*, 83 F. 2d 41 (10th Cir. 1936). Numerous state decisions also hold that such testimony is inadmissible. *People v. Garippo*, 321 Ill. 157, 151 N. E. 584 (1926); *Hinds v. State*, 196 Ind. 594, 149 N. E. 168 (1925); *Hofer v. State*, 60 Okl. Cr. 89, 61 P. 2d 268 (1936); *State v. Jones*, 62 Idaho 552, 113 P. 2d 1106 (1941).

Much of the Government's case was based upon the agent's testimony as to his conversations with petitioner's wife.

The Court of Appeals in its opinion (p. 10a, *infra*) stated:

> "* * * the effect on the net worth statement of striking the testimony [part of petitioner's wife's testimony] was determined by a stipulation to which the defense counsel agreed; and he then made no claim that other items should also have been stricken."

During the Government agent's testimony, counsel for petitioner objected to all the testimony given pertaining to the agent's conversations with petitioner's wife (T/R 601-603). The only stipulation involving this testimony was made in regards to the deletion of all accounts in the Government's net worth statement in petitioner's wife's name (T/R 914-919). The result of this stipulation was merely a mechanical change in the computation of the net

worth statement. At no time was a stipulation made to allow the rest of the controversial testimony to remain in the record without objection. Even if no objection had been made to the Government agent's testimony, petitioner would not have waived his right to object to it on appeal, since this evidence obviously affects substantial rights. Fed. Rules of Cr. Proc. rule 26, 18 U. S. C.; *Sang Soon Sun v. United States*, 167 F. 2d 431 (9th Cir. 1948).

As to Question No. 3

The decision below is in direct conflict with numerous decisions holding that the prosecutor may not use inflammatory and derogatory statements in his summation to the jury which only tend to confuse, surprise and divert the jury from the facts which should control its verdict. *Viereck v. United States*, 318 U. S. 236 (1943); *Berger v. United States*, 295 U. S. 78 (1934); *Ross v. United States*, 180 F. 2d 160 (6th Cir. 1950); *United States v. Nettl*, 121 F. 2d 927 (3d Cir. 1941).

The general principle which prevails in this area is that the prosecutor may not be permitted to go beyond fair comment upon the case. In an instance where the prosecutor has gone beyond the bounds of fairness the Court is duty bound to intervene on its own motion and prevent continuing departures from propriety. *Viereck v. United States*, 318 U. S. 236 (1943). The prosecutor in the instant case, during his summation, referred to the petitioner as a "master of cash dealing" (T/R 957) and a "leach" (T/R 958).

The prosecutor stated that petitioner corrupted his son-in-law and did not allow him to "have a fair start as a lawyer" (T/R 957-958). Reference was made to the fact that petitioner was a gambler and may have had a million dollars hidden away (T R 957, 961). Again and

again the prosecutor used sly innuendo as to the disreputable character of petitioner; the inference being that he was a criminal and as such should be removed from free society. Petitioner contends that such conduct by the prosecutor in and of itself constitutes reversible error.

As to Question No. 4

The Trial Judge committed reversible error when he instructed the jury that the Government's net worth statement (Exh. 67, p. 6a *infra*) "* * * is an overemphasis —it may be an overemphasis of evidence which is already in the record" (T/R 988), and then allowed the jury to read and discuss the net worth statement in the jury box (T/R 1007).

It cannot be denied legal precedent clearly establishes that it is discretionary with the Trial Judge as to what evidence may or may not be taken into the jury room. *Shayne v. United States*, 255 F. 2d 739 (9th Cir. 1958); *C. I. T. v. United States*, 150 F. 2d 85 (9th Cir. 1945). Petitioner contends, however, due to the fact the Government's net worth statement was admittedly not evidence, in the pure legal sense (T/R 987), the Trial Judge should not have allowed its admission into evidence over counsel's objection (T/R 780-782); especially, since in the Judge's opinion, the summary was an overemphasis of the Government's position. It is obvious from the record that the Judge had misgivings about the admissibility of this "evidence" and his charge to the jury and his refusal to allow the net worth statement in the jury room (T/R 1007) clearly indicate this. Petitioner contends the jury should *never* have been allowed to see the net worth statement under these circumstances.

Certain sections of the net worth statement are highly prejudicial and inflammatory. Under "Expenditures," items number 20 and 21 are as follows:

> "20. Fine Paid on 1955 Gambling Conviction $1,000.
>
> "21. Legal fees paid—Joseph Cafarello; Atty. $2500."

As to item number 20, petitioner's counsel agreed to stipulate only to the expenditure, not to the identifying caption (T/R 123). Also, it must be stressed that the year 1955 is *not* one of the years in which the Government charged petitioner with income tax evasion. Consequently, these two captions alone make the net worth statement highly prejudicial and not admissible into evidence.

When one considers the above along with the use of hearsay evidence, an inflammatory and prejudicial summation by the prosecutor and the flagrant use of petitioner's rather lurid background, it cannot possibly be asserted that petitioner received a fair and unbiased trial.

CONCLUSION

For these reason, this Court should—and petitioner respectfully requests that it does—issue a writ of certiorari to review the judgment of the Court below.

Respectfully submitted,

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Schenectady, New York,
Counsel for Petitioner.

LOUIS LOMBARDI,
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Schenectady, New York,
Of Counsel

Dated: July 19, 1963.

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Excerpt From Summation of the Prosecuting Attorney

[957, 958] We look forward to the Court instructing you as to how you can use it and what inference you can make from it. That is the province of the Court. It is the only method the United States Government has to go after a gambler who has no books or has inadequate books.

Cash transactions. We have got to bring in practically every member of the Gudarelli family in order to establish our own case. Why? Because this master of cash dealings, except in rare instances, used every member of his family and even his son-in-law, starting a man out while he is still in law school holding funds, a thousand, three thousand dollars at a time, not permitting the man to have a fair start as a lawyer, having him handle his own cash funds. This is the kind of defendant who sits at that table.

What does he say as to how he got all this money? He permitted his poor parents to take that stand and testify that they gave him these many thousands of dollars. I think the record speaks for itself. Taking money from his father—his story; taking his money from his mother—his story; taking money from his sons—his story; taking money from his brother—his story; what manner of leech is it that we have here? Do you realize how many thousands of dollars he claims were simply given to him between the years 1954 and 1958? Holy cow! I am not an accountant; I can't even add them up.

Excerpt From Judge Brennan's Charge to the Jury Dealing With the Government's Net Worth Statement (Exhibit 67)

[987-989] There is another type of evidence in this case which I should refer to. That is you have been given a copy of what we call a chart or a computation. Those charts—this chart computation is placed before you in the form of an exhibit and their sole—and its sole purpose is to assist the jury in understanding complicated facts and figures lengthy in number. There is no use of us deceiving ourselves. You cannot carry in your mind the number of figures that have been testified to in this litigation. Neither can I. The summaries are received not as independent evidence in themselves; they are not bits of evidence. They are not proof, because they are put down in their particular form on a particular paper, but they are an aid and a help to the jury. They are for the convenience of the jury. They are not independent or actual evidence. They are not to be given any special emphasis because they are put down on paper which you can see and they are not to be emphasized over other evidence in this case.

Ladies and Gentlemen, while I think of it, I don't believe I will let you take the summaries which you have been looking at to your jury room for the further reason—and the only reason is that it is an overemphasis—it may be an overemphasis of evidence which is already in the record.

The law imposes a heavy duty on you. You have got to remember all of the evidence here and all of these documents and every bit of these figures, and the danger in the use of a chart is that you may overemphasize some particular bit of evidence—item on it without considering the balance of the evidence related thereto. All of us, I guess, like to think we are experts and I suppose that one of the reasons why summaries are not ordinarily given to a jury is that some of us are liable to think we

Excerpt From { Judge Brennan's Charge to the Jury Dealing With the Government's Net Worth Statement (Exhibit 67)

are expert accountants and we are allowed to determine ourselves that this hasn't been made right or it has been made right, this item should be eliminated or that item should not be eliminated. You are to determine the evidence—from the evidence that is received here, not upon any preconceived notion of your own.

[1004-1007] (Proceedings resumed.)

The Court: Let the record show that it is 4:30 p. m. The Government is represented, the defendant is in court with his counsel.

A couple minutes ago the marshal in charge of the jury reported that they wanted to know if there was any time limit before they could consider that it was a hung jury. I think under those circumstances that I better send for the jury and have them pose that question direct to the Court rather than to try to send a message back through the marshal.

Bring in the jury.

(Whereupon, the jury entered the courtroom.)

Juror No. 4: May I address the Court?

The Court: Just a minute. We are short one.

Let me make a statement for the record first. At about 4:30 the marshal advised that the jury had made an inquiry from him as to whether or not there is a time limit for a hung jury, or words to that effect, and—which was entirely proper. He, of course, should not answer those questions, but they must be submitted to me. Therefore, I brought you in for that purpose, and is there such a question in your mind, and do you want that question answered?

Excerpt From Judge Brennan's Charge to the Jury Dealing With the Government's Net Worth Statement (Exhibit 67)

Juror No. 4: Your Honor, one of the jurors asked that question. We are having quite a difficult time, as you might expect, and he was concerned about the time limit and how long we can—we could have to discuss this matter.

The Court: Well, there is no time limit, ladies and gentlemen. There is no time limit for a jury deliberation. Those matters are matters that are left, I suppose, for the Court and for the jury, themselves. That is about the best answer I can give you.

It just occurred to me. Could I be of any assistance to you in any matters that may involve your deliberations? If I can, if there are any questions that you desire answered or any problem that you want clarified, why, I will try to do it for you. Is there anything that you feel that I can help you with?

Juror No. 4: Apparently, sir, that's the only question that they had in mind at that time. Apparently, it's Friday night and some of them want to get home for dinner.

The Court: Well, gentlemen and ladies, I suppose that calls for an answer from me. I'm afraid I am not going to let you get home for dinner. You have only had this case a matter of, probably, two hours and, of course, I don't want any juror coerced by the passage of time. On the other hand, the case has got to be settled. I think we tried it for seven or eight days and I think that this jury is just as capable as any other jury we will ever get to decide it, and that's the way the matter stands.

There is one—a couple of things that occurred to me. I think they were made clear in my charge, but if they weren't, I wish to clarify them now.

Number one. Your verdict, of course, must be unanimous. Number two, you will consider each count sep-

Excerpt From Judge Brennan's Charge to the Jury Dealing With the Government's Net Worth Statement (Exhibit 67)

arately. I think I told you that. Your verdict will be as to each of the three counts separately. That is, Count one, Count two and Count three.

All right, if there is nothing else that I can help you with or clear up any problem that is in your mind, why, I guess you can return or if there is something, why, please indicate.

Juror No. 4: Would the Court allow us to take these back to the jury room with us (indicating)?

The Court: No, I will let you look at them now and if there is something about them, why, you can make inquiry about them. I will try to answer it as good as I can.

You may talk among yourselves, but I wish you would keep your conversation low enough so that no one hears it, no one outside of the jury.

Exhibit 67

Government's Net Worth Statement.

(See opposite page.) ☞

GERALD A. (JERRY) and ANTOINETTE GUIDARELLI
Net Worth and Expenditure Schedule for the Period January 1, 1954 to December 31, 1958 inclusive

Items	Starting Point Jan. 1, 1954	Years Ending Dec. 31, 1954	Dec. 31, 1955	Dec. 31, 1956	Dec. 31, 1957	Dec. 31, 1958	Exhibit Numbers on Testimony
ASSETS							
1. Cash on Hand	$5,000.00	$5,000.00	$ 5,000.00	$ 5,000.00	$ 5,000.00	$ 5,000.00	Testimony-Fred A. Etoll and Special Agent
2. Cash held by Charles J. Parone				2,000.00	3,000.00	3,000.00	Testimony-Charles J. Parone and Exhibit No. 52
3. Cash Bail held by Schenectady Police Court						2,000.00	Testimony-Archie Graleski, Edmund Negorka, Joseph A. Guidarelli, Fred A. Etoll and Special Agent.
4. Cash seized by Schenectady Police Dept.						596.00	Testimony-Capt. George Morris, Fred A. Etoll and Exhibits Nos. 14 and 66
5. Cash in Bank Accounts							
Schenectady Trust Co. a/c #22237 w/ the name of Antoinette Guidarelli	435.00	1,035.78	540.98				Testimony-Edward McElroy and Special Agent Exhibit No. 32
Schenectady Trust Co. a/c #23464 w/ the name of Antoinette Guidarelli		400.00					Exhibit No. 33
Schenectady Trust Co. a/c #24499 w/ the name of Antoinette Guidarelli				503.33	508.13	222.14	Testimony-Edward McElroy and Special Agent
Schenectady Savings Bank a/c #376055 in the name of Antoinette Guidarelli in Trust for Theresa Parone				230.00	276.11	350.33	Testimony-Edward McElroy and Special Agent Exhibit No. 34
Schenectady Trust Co. checking a/c in the name of Gerado Quindarella			13.95	7.95	6.12		Testimony-Gary Moffit and Special Agent Exhibit No. 56
6. Securities in name of Antoinette Badalucco			731.74				Testimony-Edward McElroy and Special Agent Exhibot No. 40
7. Loan to Son, Anthony G. Guidarelli							Stipulation in Open Court
8. Merchandise Inventory-Lee's News	1,250.00	1,040.00	1,120.50	890.44	2,900.00 536.82	2,900.00 914.16	Testimony-Anthony G. Guidarelli
9. Fixtures-Lee's News	1,575.00	1,575.00	1,575.00	1,575.00	1,575.00	1,575.00	Income Tax Returns-Exhibits 3, 4, 5, 6, 7
10. Fixtures Purchased						600.00	Income Tax Returns-Exhibits 3, 4, 5, 6, 7
11. Radio Equipment						350.00	Stipulation in Open Court
							Testimony-Anthony Renna

GERALD A. GUIDARELLI and ANTOINETTE GUIDARELLI
Net Worth and Expenditures Schedules for the Period
January 1, 1954 to December 31, 1968 inclusive

Items	Starting Point Jan. 1, 1954	Years Ending Dec. 31, 1954	Dec. 31, 1955	Dec. 31, 1956	Dec. 31, 1957	Dec. 31, 1958	Exhibit Numbers on Testimony
ASSETS Continued							
12. Real Estate-942-944 Francis Ave. Schenectady, N. Y.	$	$	$	$	$	$12,000.00	Testimony-Fred A. Etoll and Special Agent
Total Assets	8,260.00	9,050.78	8,982.17	10,206.72	13,802.18	29,507.63	
LIABILITIES AND RESERVE							
13. Due Marth Chisox on Lee's News	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	Testimony-Fred A. Etoll and Special Agent
14. Due G.M.A.C.	607.41						
15. Due Anthony Esposito				750.00	390.00	30.00	Testimony-Robert Clark and Special Agent Exhibit 51 and Stipulation in Open Court
16. Due Son, Jerry Guidarelli, Jr.						2,805.05	Stipulation in Open Court
17. Reserve for Depreciation, Store Fixtures	315.00	472.50	630.00	787.50	945.00	1,102.50	Testimony-Gerald A. Guidarelli, Jr.
Total Liabilities and Reserve	1,922.41	1,472.50	1,630.00	2,537.50	2,335.00	4,937.55	Income Tax Returns-Exhibits Nos. 3, 4, 5, 6, 7
Net Worth, End of Year	6,337.59	7,578.28	7,352.17	7,669.22	11,467.18	24,570.08	
Less: Net Worth, Beginning of Year		6,337.59	7,578.28	7,352.17	7,669.22	11,467.18	
Net Worth Increase or (Decrease)		1,240.69	(226.11)	317.05	3,797.96	13,102.90	
Add: Expenditures							
18. Currency Paid for Car Purchases							
Car / In Name of							
1955 Plymouth / Antoinette Guidarelli			1,520.00				
1954 Ford (2 TV sets) Jerry A. Guidarelli (included)				1,000.00			Testimony-Fred A. Etoll and Special Agent Exhibit 26 and 26A
1955 Buick / Joseph A. Guidarelli							Testimony-Harvey Capullo
1956 Cadillac / John Napolitano				1,500.00			
1957 Cadillac / Jerry A. Guidarelli				3,000.00			Testimony-Joseph A. Guidarelli
1958 Cadillac / Jerry A. Guidarelli					2,250.00		Testimony-Special Agent, Exhibits 29 and 29B
1958 Plymouth / Theresa Farone						1,600.00	Stipulation in Open Court and Exhibit 47
1954 Oldsmobile / Theresa Farone						2,750.00	Stipulation in Open Court and Exhibit 49
19. Payment on Industrial Bank of Schenectady-Car Note						900.00	Testimony-Charles J. Farone and Thomas Pete
						1,651.68	Testimony-Ralph DeLorenzo
20. Fine Paid on 1955 Gambling Conviction			1,000.00				Testimony-Representative of Industrial Bank of Schenectady and Special Agent, Exhibit N. 42
21. Legal Fees paid-Joseph Caferella, Attorney			2,500.00				Stipulation in Open Court
22. Life Insurance Premiums		333.21	452.16	491.91	492.65	608.50	Testimony-Special Agent, Stipulation in Open Court
23. Payments for Furniture Purchases			346.36	583.70			Testimony-Paul Mitchell, Exhibit No. 45
24. Payment for Color TV Set					500.00		Stipulation in Open Court
25. Federal Income Tax Payment			178.05	264.66	659.00	514.44	Stipulation in Open Court
							Income Tax Returns Exhibits 3, 4, 5, 6, 7

GERALD A. (JERRY) and ANTOINETTE GUIDARELLI
Net Worth and Expenditure Schedule for the Period
January 1, 1954 to December 31, 1958 inclusive

Items	Starting Point Jan. 1, 1954	Years Ending Dec. 31, 1954	Dec. 31, 1955	Dec. 31, 1956	Dec. 31, 1957	Dec. 31, 1958	Exhibit Numbers or Testimony
EXPENDITURES Continued							
26. Miscellaneous Personal Living Expenses		$2,600.00	$ 2,600.00	$ 2,600.00	$ 3,120.00	$ 3,120.00	Testimony-Fred A. Etoll and Special Agent
27. Residence-Rental		480.00	480.00	480.00	480.00	320.00	Testimony-Fred A. Etoll and Special Agent
28. Car Insurance		200.00	200.00	200.00	200.00	300.00	Testimony-Special Agent
29. Hospitalization Insurance				60.00	120.00	60.00	Testimony-Special Agent
30. Fire Insurance		50.00	50.00	50.00	50.00	50.00	Testimony-Special Agent
31. Vacation Expenses-Florida and Saratoga Lake					330.00		Testimony-Special Agent
32. Wedding Gift-Theresa Farone			100.00				Testimony-Special Agent
33. Doctor and College Expense for Son Gerald A. Guidarelli, Jr.						373.00	Testimony-Special Agent
Total Expenditures		3,663.21	9,426.51	10,230.27	8,291.65	12,244.62	
Total Net Worth Increases Plus Expenditures		4,907.90	9,200.40	10,547.32	12,089.61	25,347.52	
Deduct: Non Taxable Receipts							
34. Received on Sales of Cars							
1955 Plymouth sold 1955			2,000.00				Testimony of Joseph A. Guidarelli
1954 Ford Sold 1958						500.00	Testimony of Joseph A. Guidarelli
1954 Oldsmobile sold 1958						500.00	Stipulation in Open Court
35. Gift of Residence-942-944 Francis Ave., Schenectady, N.Y.						12,000.00	Testimony Fred A. Etoll
36. Received on Sales of TV Sets				500.00		500.00	Testimony of Special Agent
37. Rebate- Industrial Bank of Schenectady						52.49	Exhibit No. 42
Total Non Taxable Receipts			2,000.00	500.00		13,552.49	
38. Adjusted Gross Income per Net Worth-Expenditure Method		4,907.90	7,200.40	10,047.32	12,089.61	11,795.03	
39. Adjusted Gross Income reported on Income Tax Returns filed		2,568.39	2,998.77	4,218.71	3,538.94		Exhibits 3, 4, 5, 6
40. Unreported Adjusted Gross Income per Net Worth-Expenditure Method		2,339.51	4,201.63	5,828.61	8,550.67		
41. For 1958:							
Optional Standard Deduction						1,000.00	
42. Taxable Income before Exemptions						10,795.03	
43. Exemptions						1,800.00	
44. Taxable Income per Net Worth-Expenditure Method						8,995.03	
45. Taxable Income Reported on Tax Return Filed						4,200.42	Exhibit 7
46. Unreported Taxable Income per Net Worth-Expenditure Method						4,794.61	

Judgment and Commitment (Rev. 7-52)

UNITED STATES DISTRICT COURT

for the

NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

GERALD A. GUIDARELLI

No. 33017

On this 26th day of November, 1962, came the attorney for the government and the defendant appeared in person and by counsel, Louis Lombardi. The Court advised the defendant of his right to speak in his own behalf, defendant spoke, his attorney spoke.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty on counts one and two, and not guilty on count three of the offense of attempting to evade a large part of income tax due for the calendar year of 1956, and the calendar year of 1957, by filing false returns, in violation of Sec. 7201 IRC of 1954 T26 USC, Sec 7201 as charged in counts one and two of Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

Judgment and Commitment (Rev. 7-52)

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six months on count one; and pay a fine of $1,250 and stand committed until paid. The same jail sentence is imposed on count two, to run concurrently with that of count one, and the same fine of $1,250 is imposed, total fine of $2,500, and stand committed until paid.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

STEPHEN W. BRENNAN
United States District Judge.

Approved:
DANTE M. SCACCIA
Asst. U. S. Attorney

Opinion of the United States Court of Appeals, Second Circuit—With Correction

[2249]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 340—October Term, 1962

(Argued April 30, 1963 Decided June 4, 1963)

Docket No. 28038

UNITED STATES OF AMERICA,

Appellee,

v.

GERALD A. GUIDARELLI, a/k/a GERARDO A. QUINDARELLI,

Defendant-Appellant.

Before:

CLARK, SMITH, and HAYS, *Circuit Judges.*

Appeal from the United States District Court for the Northern District of New York, Stephen W. Brennan, Judge.

Gerald A. Guidarelli, a/k/a Gerardo A. Quindarelli, appeals from a conviction under I. R. C. 1954, §7201, for wilful evasion of income tax. Affirmed.

LOUIS LOMBARDI, Schenectady, N. Y., *for defendant-appellant.*

DANTE M. SCACCIA, Asst. U. S. Atty., N. D. N. Y., Syracuse, N. Y. (Justin J. Mahoney, U. S. Atty., N. D. N. Y., Albany, N. Y., Louis F. Oberdorfer, Asst. Atty. Gen., and Lee A. Jackson, Joseph M. Howard, and Norman Sepenuk Attys., Dept. of Justice, Washington, D. C., on the brief), *for appellee.*

Opinion of the United States Court of Appeals, Second Circuit—With Correction

[2250] CLARK, *Circuit Judge*:

Defendant was convicted of willfully attempting to evade and defeat his income taxes for the years 1956, 1957, and 1958 by filing false and fraudulent returns, in violation of I. R. C. 1954, §7201. During the prosecution years he claimed as his only source of income the newsstand and gift shop which he operated, known as "Lee's News." Using the net worth method of proof the prosecution introduced evidence of cash on hand, various automobiles of which the purchase price was attributable to the defendant, legal fees life insurance premiums, and miscellaneous personal living expenses—all of which tended to show funds at his disposal indicating that a substantial tax was due and owing from him for the years involved. The government contended that the indicated deficiencies in the income reported arose from gambling and bookmaking activities—a taxable source of income—and pointed to defendant's failure to keep books, his excessive use of currency, and the concealment of assets by placing several of the automobiles purchased by defendant in the name of relatives as proof of the necessary element of willfulness. The primary theory of defense below was that the net worth increases which the government had shown were due to the receipt of cash loans from defendant's parents.

On appeal the defendant argues that the district court erred in permitting Special Agent O'Sullivan to testify regarding statements made to him by defendant's wife. Defendant contends that admission of this testimony was in violation of spousal privilege. While we agree that the testimony in question presents some interesting questions as to the application of both the spousal privilege rule and the hearsay rule, we need not concern ourselves with them here. For Judge Brennan had second thoughts about this aspect of Special Agent O'Sullivan's testimony and, on [2251] his own motion, ordered the items in the net worth

account based upon the wife's statements stricken from the record. Defendant now seems to claim that Judge Brennan failed to strike all the items on which the wife's statement had bearing. But the effect on the net worth statement of striking the testimony was determined by a stipulation to which the defense counsel agreed; and he then made no claim that other items should also have been stricken. Thus he has no ground to challenge the failure to include such other items in the exclusion.

Defendant also complains of the use in evidence of his arrests for bookmaking in 1955 and 1958, his conviction for those offenses, and the payment by him in 1955 of a $1,000 fine. The government may have made generous use of defendant's vulnerability from his gambling activities, but this was part of the story and the case. Any prejudice here was dispelled by Judge Brennan's instructions to the jury.

While we believe the prosecutor did overstep the bounds in summation—calling defendant a leech and accusing him of ruining a young law student relative's career by having the boy hold cash for him—we do not feel that these comments were sufficiently prejudicial to warrant reversal.

Affirmed.

The opinion above is in error, in that it states that the petitioner was convicted of income tax evasion for the year 1958. This misstatement was corrected by subsequent letter from the court to all parties concerned, but is not reflected in the opinion above.

Denial of Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

GERALD A. GUIDARELLI, a/k/a GERARDO A. QUINDARELLI,

Defendant-Appellant.

Docket No. 28038

Before:

CLARK, SMITH, and HAYS, *Circuit Judges.*

On Petition for Rehearing.

LOUIS LOMBARDI, Schenectady, N. Y., for defendant-appellant.

PER CURIAM.

Petition for rehearing denied.

C. E. C.,
J. J. S.
P. P. H.
U. S. C., JJ.

June 24, 1963



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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 295

GERALD A. GUIDARELLI, A/K/A GERARDO A. QUINDARELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 10a–12a) has not yet been officially reported.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1963. Petition for rehearing was denied on June 24, 1963 (Pet. 13a). The petition for a writ of certiorari was filed on July 22, 1963. The jurisdiction of this Court is invoked under 28 U.S.C., 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in permitting the government to show a taxable source of income by

evidence that petitioner had engaged in gambling activities.

2. Whether petitioner was prejudiced when, after the special agent had testified concerning his conversations with petitioner's wife, the trial court struck from the net worth statement all items based on such testimony.

3. Whether the prosecutor's remarks in summation were improper.

4. Whether the government's net worth statement was properly received into evidence.

STATUTE INVOLVED

Internal Revenue Code of 1954:

> SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

(26 U.S.C., 1958 ed., Sec. 7201.)

STATEMENT

1. On December 19, 1961, an indictment in three counts was filed against petitioner in the United States District Court for the Northern District of New York, charging that he had wilfully attempted to evade and defeat his income taxes for the years 1956, 1957 and 1958 by filing false and fraudulent tax returns, in violation of Section 7201 of the Internal

Revenue Code of 1954. The indictment alleged that he had reported an income tax liability of $533 for 1956, $395 for 1957 and $844.09 for 1958, whereas his correct tax liability for those years was $1,622.65, $2,140.10 and $1,921.16. (R. 141–143.)[1] After a seven day jury trial, petitioner was found guilty on counts one and two, and not guilty on count three. On November 26, 1962, the District Court imposed concurrent sentences of imprisonment for six months on each count, and fined petitioner a total of $2,500. (Pet. 9a.)

2. The evidence to support the verdict of guilt, the sufficiency of which is unchallenged by petitioner, may be briefly summarized as follows:

(a) *Proof of petitioner's tax deficiencies.*—During the prosecution years, petitioner operated a news stand and gift shop, known as "Lee's News," located in Schenectady, New York. According to his 1956 and 1957 income tax returns, petitioner's sole source of income was from "Lee's News," and he reported a net profit from this business of $4,218.71 in 1956 and $3,538.94 in 1957 (Ex. 67; Pet. 7a). Petitioner, during the Internal Revenue investigation of his tax returns, could produce no books and records to verify the income reported by him on his returns. (R. 60.) Accordingly, the special agent proceeded to reconstruct petitioner's income by means of the net worth method. (R. 87.)

At the trial, upon the basis of the testimonial and documentary evidence in the case (R. 88), the govern-

[1] Record references are to the government's appendix in the court of appeals.

ment submitted its net worth statement graphically portraying petitioner's tax deficiencies for the years involved (Ex. 67; Pet. 7a). The net worth statement revealed that petitioner had failed to report taxable income amounting to $5,828.61 in 1956 and $8,550.67 in 1957, with a resulting tax deficiency in those years of $1,113.41 and $1,776.30, respectively. (Ex. 67; Pet. 7a; R. 109–113.)

(b) *The source of the unreported income.*—While petitioner's tax returns reported income only from his news and gift shop establishment, his accountant, Fred Etoll, informed the special agent during the investigation that petitioner also conducted a gambling operation. (R. 39.) Since petitioner had no books and records with respect to these gambling activities (R. 39), the government introduced evidence to demonstrate that his unreported income was derived in part from gambling receipts.

The evidence, as introduced at the trial, established that petitioner, on July 8, 1955 and August 13, 1958, applied to the Internal Revenue Service for a federal wagering stamp, and filed excise tax returns which disclosed that he had derived income by accepting wagers (R. 56); that the Schenectady vice squad engaged in continual surveillance of petitioner's activities as "part of [their] daily routine of checking on gambling in Schenectady" (R. 2); that petitioner was arrested in 1955 on bookmaking and policy charges (R. 65); that on July 14, 1955, petitioner paid a $1,000 fine for these offenses to the Police Court of Schenectady (R. 6-7); that on August 13, 1958, the vice squad raided petitioner's gambling operation and

took from him $596 in currency, together with various gambling paraphernalia, including two way radios, flash paper, etc. (R. 2–3); that, as a result of evidence uncovered in this raid, petitioner was arrested for gambling; and that in his 1958 income tax return, under the section "Other Income," petitioner disclosed that he received $1,940 as a "commission agent" for "sporting events" (R. 66). Petitioner informed the special agent that this latter amount represented money which he had won by betting on various sporting events (R. 66). Petitioner further admitted to the special agent that he had made money betting in years prior to 1958, but that "when he prepared those returns himself, he never thought of reporting income from betting." (R. 67.)

(c) *Evidence of wilfulness.*—To prove the element of wilfulness, the government introduced evidence that petitioner had engaged in a course of conduct calculated to conceal the magnitude of his business operations and designed to prevent the investigation thereof. This evidence established that petitioner, during the prosecution years, maintained no records for either his newsstand and gift shop business or with respect to his gambling operation (R. 39, 60); that petitioner's financial transactions were carried on largely through the use of currency, including currency transactions in the form of loans, gambling receipts, automobile purchases, payment of legal fees, and payments for certain household items (Ex. 67, Items 2, 4, 7, 18, 21, 23, 24; Pet. 7a); and that during the prosecution years petitioner made cash purchases of several automobiles, which he caused to be placed

in the names of various relatives (Ex. 67, Item 18; Pet. 7a).

ARGUMENT

1. There is no merit to petitioner's complaint (Pet. 4–5) that the trial court erroneously permitted the government to introduce evidence relating to his gambling and bookmaking operations in the City of Schenectady. The evidence about which petitioner complains pertains chiefly to his arrests for bookmaking in 1955 and 1958, his conviction for these offenses, and the payment by him in 1955 of a $1,000 fine. (See Statement, *supra.*) This evidence was introduced, not only for the purpose of establishing various assets and expenditures in the government's net worth statement (Ex. 67, Items 3, 4, 20; Pet 7a), but also to show that petitioner's unreported income came from a taxable source, *i.e.*, gambling receipts. *Holland* v. *United States*, 348 U.S. 121, 137.

Petitioner seeks to minimize the importance of the government's duty to prove a taxable source of income [2] by arguing that the allegedly prejudicial nature of this evidence outweighed its probative value.

[2] Petitioner seems to doubt (Pet. 5) that such a duty exists when the evidence—as in the instant case—has already demonstrated the existence of one taxable source, *i.e.*, Lee's News. But where, as here, the defendant keeps no books and records to establish the income potential of his business, and where it cannot be legitimately claimed that the business is one with "indeterminate possibilities" of producing income (*United States* v. *Costello*, 221 F. 2d 668, 672 (C.A. 2d), affirmed, 350 U.S. 359), it is clear that the government can, and must, establish an additional source of income. *Holland* v. *United States*, *supra*, 137–138; *United States* v. *Calderon*, 348 U.S. 160, 165–166.

(Pet. 5.) That argument is unsound.[3] It is a well settled rule that evidence relevant to the proof of one crime is not inadmissible merely because it discloses the commission of another. *United States* v. *Eury*, 268 F. 2d 517, 520 (C.A. 2d) (and cases cited therein). While such evidence admittedly may tend to create prejudice against a defendant, the trial court, in its discretion, may admit such testimony by weighing its probative value against the possibility of prejudice. *United States* v. *Krulewitch*, 145 F. 2d 76. (C.A. 2d).[4] These principles apply with equal force to a prosecution for tax evasion, and are especially pertinent to a net worth case, where the govern-

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[3] We note that there is no support in the record for petitioner's claim that he "offered to stipulate that he was a professional gambler." (Pet. 5.) Moreover, had such a stipulation been offered, the government need not have accepted it. *Parr* v. *United States*, 255 F. 2d 86, 88 (C.A. 5th), certiorari denied, 358 U.S. 824.

[4] In the instant case the prejudice, if any, was dispelled by the trial court's final instructions to the jury, as follows (R. 135):

"The Government contends that this defendant was engaged during the pertinent years in a news business or running a store and the Government contends that in addition he was engaged in the matter of making or taking bets. The nature of his business is not important except insofar as it relates to the disclosure or non-disclosure of income.

"You may not punish this defendant because he may have been violating some state law. That is not for us.

"We here in the Federal Court are not interested in it and because he may have violated a state law is no reason and no basis for a conviction here. Your determination must rest on the crime charged in the indictment and on nothing else."

Petitioner took no exception to the court's charge. (R. 140.)

ment, to show a taxable source, adduces evidence that a defendant derives his income from illegal activities.

Applying these principles to the instant case, it is clear that the failure of petitioner to account for his unreported income, either by keeping records or otherwise, made it necessary for the government to introduce evidence that his income was derived from a taxable, albeit an illegal, source.

2. Petitioner asserts (Pet. 6–7) that the special agent's testimony concerning his conversations with petitioner's wife violated both the spousal privilege and hearsay rules. Little need be added to the comments of the court of appeals in rejecting this argument (Pet. 11a–12a):

> * * * While we agree that the testimony in question presents some interesting questions as to the application of both the spousal privilege rule and the hearsay rule, we need not concern ourselves with them here. For Judge Brennan had second thoughts about this aspect of Special Agent O'Sullivan's testimony and, on his own motion, ordered the items in the net worth account based upon the wife's statements stricken from the record. * * *

While petitioner concedes that this is so (Pet. 6–7), he claims that "the rest of the controversial testimony" was allowed to remain in the record. (Pet. 7.) We are not aware of either the "controversial testimony" to which petitioner refers, or how he was prejudiced by leaving such alleged testimony in the record.

3. Petitioner objects (Pet. 7–8) to various comments of the prosecuting attorney in summation. While the court of appeals believed that the prosecutor "did overstep the bounds in summation," it did "not feel that these comments were sufficiently prejudicial to warrant reversal." (Pet. 12a.) We need only add that at no time during or after the closing argument of the prosecuting attorney did petitioner offer any objection. (R. 128–129.)

4. Petitioner complains, finally (Pet. 8–9), that the trial court should not have admitted into evidence the government's net worth statement. At the trial, petitioner did not object to the admission of the net worth statement, except to allege that some of the items therein "were based on incompetent and insufficient evidence." (R. 116.)

The use of such summaries of the evidence in complicated income tax prosecutions has long been recognized. *Swallow* v. *United States*, 307 F. 2d 81, 84 (C.A. 10th), certiorari denied, 371 U.S. 950, (and cases cited therein). In *Holland* v. *United States*, *supra*, pp. 127–128, this Court implicitly sanctioned the use of such summaries, but warned that they might be given unwarranted emphasis if sent to the jury room without guarding instructions. In the instant case, the trial court did not even permit the net worth computation to be sent to the jury room on the ground that it "may be an overemphasis of evidence which is already in the record." (R. 131.) Moreover, the court correctly advised the jury concerning the pur-

pose of such summaries, and their function in the case.[5] It is clear that the trial court soundly exercised its discretion in admitting the net worth computation into evidence.

CONCLUSION

Further review by this Court is unwarranted. There is no conflict of decisions, and no important question of law is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.
LOUIS F. OBERDORFER,
Assistant Attorney General.
JOSEPH M. HOWARD,
NORMAN SEIFENUK,
Attorneys.

AUGUST 1963.

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[5] The Court instructed the jury as follows (R. 130-131):

"There is another type of evidence in this case which I should refer to. That is you have been given a copy of what we call a chart or a computation. Those charts—this chart computation is placed before you in the form of an exhibit and their sole—and its sole purpose is to assist the jury in understanding complicated facts and figures lengthy in number. There is no use of us deceiving ourselves. You cannot carry in your mind the number of figures that have been testified to in this litigation. Neither can I. The summaries are received not as independent evidence in themselves; they are not bits of evidence. They are not proof, because they are put down in their particular form on a particular paper, but they are an aid and a help to the jury. They are for the convenience of the jury. They are not independent or actual evidence. They are not to be given any special emphasis because they are put down on paper which you can see and, they are not to be emphasized over other evidence in this case."

U.S. GOVERNMENT PRINTING OFFICE 1963